

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office
in Jefferson City on the 6th
day of December, 1995.

In the matter of the application of Leland Mitten,)
trustee of the Revocable Living Trust Agreement of)
Leland Mitten, dated February 5, 1991, and)
Leland Mitten, successor trustee of the Revocable)
Living Trust Agreement of Erma Mitten, dated) Case No. WM-95-423
February 5, 1991, to sell all shares of stock in)
Finley Valley Water Company, Inc., to The Public)
Funding Corporation of the City of Ozark, Missouri.)
)

ORDER APPROVING SALE,
ORDER GRANTING INTERVENTION,
AND ORDER REQUIRING TARIFF

Table of Contents

	<u>Page</u>
I. Procedural History	1
II. Public Hearing	6
III. Application to Intervene	13
IV. Public Funding Corporation	15
V. Extraterritorial Representation	16
VI. Findings of Fact	20
VII. Conclusions of Law	22
VIII. Ordered Section	23

Administrative Law Judge: Dale Hardy Roberts, Deputy Chief.

I. Procedural History

On June 21, 1995, Finley Valley Water Company (Finley Valley or Applicant) filed an application requesting authority to sell and transfer its corporate stock and its franchise, works or system pursuant to Section 393.190, R.S.Mo. 1978 (sic). Finley Valley is a small water company serving approximately 180 customers in Christian County, Missouri. Finley Valley has requested

permission to sell its corporate stock to the Public Funding Corporation (PFC) of the City of Ozark (City or Ozark). PFC is a not-for-profit corporation existing under the laws of the state of Missouri and is held by or operated by Ozark. Ozark is a fourth class city which is incorporated under Chapter 79 of the statutes. Pursuant to the application, PFC intends to purchase all the shares of Finley Valley and enter into a lease/purchase agreement with Ozark for the waterworks. The application states that upon acquisition of the stock, the current owners of Finley Valley would cease doing business as a regulated utility and for that reason would request that their certificate and tariff be canceled. At that same time, PFC intends to dissolve the Finley Valley Water Company, Inc., and PFC will lease the water company to Ozark so that the provision of water service to the former customers of Finley Valley will now be made by Ozark as a lessee of PFC.

The Missouri Public Service Commission (Commission) issued an Order And Notice in this case on June 23, 1995, which established an intervention deadline of July 24, 1995. The Commission received no timely requests for intervention but has received a request for intervention out of time. That request will be addressed in Section III of this order. The Order And Notice directed that notice of the application be sent to the mayor of each city and the county commission of each county in Finley Valley's service area. The Order And Notice also required the Commission's Information Office to send notice of the application to the publisher of each newspaper located in the service area of Finley Valley and to the members of the General Assembly representing the Missouri area served by Finley Valley.

The Commission required Finley Valley to provide individual notice to each customer to be affected by the proposed transaction. The application included, as Attachment E, a notice which Finley Valley proposed to issue to its customers. The Commission found that the proposed notice failed to provide

accurate information regarding the fees to be charged after the sale of Finley Valley to PFC and/or the City of Ozark. The Commission's Order And Notice directed that Finley Valley issue a notice which reflected the average customer monthly bill for water service, after the sale, in relationship to the number of gallons of water consumed for that billing cycle. In response to the order, Finley Valley filed a certificate of service on July 14, 1995, indicating that it had issued notice to all of its customers and that the notice stated: "The customer monthly bill for water service after such sale will be \$9.61 for 3,000 gallons (plus \$2.93 per 1,000 gallons up to 25,000 gallons)."

On September 13, 1995, the Water and Sewer Department Staff of the Commission (Staff) filed its memorandum in this case. The Staff memorandum included a comparison of monthly rates for water service which indicated that under the current owner Finley Valley customers pay a \$5.40 monthly charge plus \$1.96 for every 1,000 gallons of water consumed. The proposed rates under City ownership would be \$6.68 per month and this amount would include the first 2,000 gallons of water consumed. Thereafter, there would be a \$2.93 charge for every 1,000 gallons of water. Staff stated that a change to the City rates would amount to an overall increase for the Finley Valley water system of 6.6 percent. Staff went on to state that customers using fewer than 4,700 gallons per month would experience a decrease in rates, and customers using in excess of that amount should experience an increase in rates. The Staff recommended that the Commission authorize this sale of the stock of Finley Valley.

On or about September 28, 1995, the Staff orally communicated to the Administrative Law Judge (ALJ) to whom this case was assigned the fact that the City had already begun reading meters for the Finley Valley customers, issuing bills for their water service and collecting revenue for these accounts according to the increased rates. Staff made this communication in terms of a procedural request that final disposition of this case be expedited to avoid any conflict

with Section 393.190, R.S.Mo. 1994. This statutory provision prohibits a regulated utility from transferring all or part of that utility without legal authority to do so. The Staff simultaneously advised the attorney who represents both the City of Ozark and the Finley Valley Water Company of the potential problems which might arise as a result of the actions of the City. On this same date, the ALJ contacted legal counsel for the Office of the Public Counsel (OPC) to disclose the nature of the communication from the Staff regarding the proposed disposition of this case. OPC stated at that time it had no objection to an expedited disposition of this case consistent with the terms set out in the Staff memorandum. OPC further indicated that it did not intend to submit any written pleadings in this case.

On October 2 a letter was filed in this case which was jointly submitted by Finley Valley, PFC and Ozark. This letter stated that "[d]ue to the health problems of Mr. Leland Mitten, all parties to this transaction are very anxious to have an order of the Commission effective at the earliest possible date. It has been necessary for the City of Ozark to assume meter reading, billing and collection responsibilities as of September 1. . . ."

On October 3, 1995, OPC filed a document captioned Motion Concerning Public Hearing. Within this motion OPC made a record of the fact that on or about August 16, 1995, the customers of Finley Valley had received a letter from "Ozark Water System" which began as follows:

"Dear Customer:

The City of Ozark has recently purchased the Finley Valley Water System from Mr. Leland Mitten and beginning in September you will be billed by the Ozark Water System. . . ."

OPC went on to note for the record that the City was apparently operating the water system as of August 16 without authorization from the Public Service Commission and, indeed, the City was billing the Finley Valley customers at an increased rate. OPC next noted that on or about September 29, 1995, customers

were sent a letter by the "Ozark Water System" which claimed that its September billing was "incorrectly calculated" as a result of "the delay in paperwork by the Public Service Commission." Lastly, OPC noted that on October 2, 1995, it had received a petition from a group of approximately 43 signatories purporting to be the customers of Finley Valley and representing itself as the "Finley Water Committee". The petition requested that the Commission hold a public hearing to hear concerns regarding the ramifications of the proposed sale. The petition was attached to OPC's motion. OPC's position in this motion was that it did not necessarily object to the rates proposed by the City. However, OPC argued that the unauthorized actions of the City raised questions regarding the quality of service that would be available to customers in the affected service area, stating:

"If the sale is approved, these customers will have no political representation within the city that will be setting its rates since the service area falls outside of Ozark's city limits. In addition, if the Commission approves the sale, ratepayers will no longer benefit from the Commission's regulatory control over water rates."

On October 13, 1995, Carole Scrofne and Lisa Webb attended the Commission's Friday morning Agenda session. The "Agenda" is the public meeting of the Commissioners at which Commission business is conducted. These two individuals attended the public meeting and were offered the opportunity to address the Commissioners regarding their requests. Also present at this Agenda meeting was attorney James Fischer. Mr. Fischer had entered his appearance three days earlier as legal counsel for Ozark. In response to the complaints raised by these two customers, Mr. Fischer telephoned the representatives of his client and returned to Agenda to confirm that the mayor and other representatives of Ozark would be available to meet with the Finley Valley customers on Tuesday, October 17, 1995.

On October 13, 1995, the Commission issued an Order Setting Local Public Hearing. This order was issued not only in response to the petition and motion filed by OPC but also in response to telephone calls and letters received from customers of Finley Valley who were concerned about the proposed transaction. In addition, the Commission received a letter on October 12, 1995, from State Representative Jim Kreider of the 142nd District. Representative Kreider's letter reiterated the concerns of the affected customers and requested the Commission convene a public hearing as an additional opportunity for input. Representative Kreider specifically noted in his letter that: "I might point out that these patrons who are affected are not in the city limits of Ozark; therefore, they have no representation on the City Council. This is their only chance to be heard."

On October 18, 1995, the Commission convened a public hearing in Ozark, Missouri, in order to allow the customers of Finley Valley the opportunity to be heard on the issue of the proposed sale. The transcript from the public hearing was filed on November 3, 1995, no party to this case has requested a hearing, and the matter is now pending final disposition by the Commission.

II. Public Hearing

The Commission convened a local public hearing in this case on October 18, 1995, in Ozark, Missouri. This hearing was held in the circuit courtroom of the Christian County Courthouse. An exact count as to the attendance is not available; however, the courtroom was filled to capacity. Staff and OPC appeared by counsel, as did Finley Valley. At the time the application in this case was filed, Finley Valley and City of Ozark were both represented by the same attorney. However, on October 10, 1995, James Fischer entered his appearance on behalf of the City of Ozark. The City of Ozark was not

represented by counsel at the public hearing, but several city officials did appear and speak on behalf of the City.

Steve Horton, the Ozark City Administrator, stated on the record that the City had, in fact, begun reading the meters of the customers of Finley Valley, billing those customers and billing them at the increased City of Ozark rate. This is a violation of Section 393.190, R.S.Mo. 1994, and appears to constitute the collection of rates which are not approved by tariff. Mr. Horton also confirmed that Ozark had prematurely sent out letters stating that it had already purchased Finley Valley and confirmed that this, too, was in error. No explanation was offered to demonstrate why Ozark's letter attributed delays to the Public Service Commission.

The primary speaker on behalf of the customers of Finley Valley was Carole Scrofne. Mrs. Scrofne outlined the problems experienced by the customers as follows:

(1) First, Mrs. Scrofne testified that as a part of assuming the duties and responsibilities of Finley Valley Water Company, the City of Ozark had notified all customers of Finley Valley that their addresses would be changed. For example, Mrs. Scrofne testified that her address is and always has been 104 Dogwood, but in order to make her address compatible with the City of Ozark's numbering system and in order to fit her address into the City's billing system, the City was going to require her address to be changed to 102 North 43rd Street. The customers of Finley Valley were advised that this is an issue over which the Public Service Commission has no jurisdiction. However, the customers did continue to cite this problem as an example of the City of Ozark's disregard for the rights of the Finley Valley customers who live outside the city limits. In fact, these Finley Valley customers all have a Nixa, Missouri, address, at least for the purpose of mail delivery. It was unclear at the time of the public hearing how Ozark had authority to change the address of residents who live

outside the city limits, but the testimony seemed to indicate that Christian County had acquiesced its authority in this matter to Ozark in conjunction with a numbering plan to facilitate Emergency 911 service. It would now appear that the Finley Valley customers could have one address for purpose of mail which is delivered to them out of the Nixa, Missouri, post office, and yet another address which is used for the purpose of billing by Ozark.

(2) The second complaint raised by Mrs. Scrofne arose from the fact that the notice issued directly to the customers of Finley Valley was not the notice which was approved by the Commission. The Staff filed, on October 12, 1995, its Revision To Staff's Response To Motion Concerning Public Hearing (Revision) in which it addressed this issue. Attached to the Revision were the various notices which were offered, rejected, proposed and subsequently issued. In the final analysis, it appears that the certificate of service which stated that the notice attached to it (Exhibit 5) had been delivered to all customers of Finley Valley was incorrect. It appears that the notice which was sent to customers was the notice which was rejected by the Commission. The Commission is concerned over the fact that it would specifically reject a notice and order a more informative notice for the customers only to later discover that the notice attached to a sworn affidavit as that notice which was issued, in fact was never sent. It remains unclear exactly what notice was sent to the customers of Finley Valley. The Commission can only find on this issue that the customers did receive some notice of a proposed sale, the customers did receive notice that some change in their rates would take place, and the Commission believes the notice sent to the customers did contain a name and/or telephone number to which the customers of Finley Valley could direct their inquiries. However, this notice was less than optimal and certainly did not comply with the Commission order.

(3) Mrs. Scrofne's next issue of concern had to do with the willingness, or lack thereof, of City representatives to meet with her or with any other customers of Finley Valley. Mrs. Scrofne highlighted the fact that the letter issued by Ozark which prematurely stated that the City was now operating the water company was attributed to a city clerk. The City Administrator and the City's attorney suggested that unauthorized changes in this letter were made by the clerk on her own initiative. Mrs. Scrofne's concern on her behalf and on behalf of the other customers of Finley Valley might be characterized by the expression, "Who's minding the store?" At this point Ozark had apparently decided to proceed with providing all services to the Finley Valley customers including meter reading, billing at the new increased rate, mailing bills and collecting rates and providing Finley Valley customers with untariffed service under the unapproved company name ("Ozark Water System"), all of which was done without Commission approval. Mrs. Scrofne testified that attempts to address these concerns to the City of Ozark were ignored or deferred in such a way that she was unable to receive answers to her questions from Ozark.

(4) Mrs. Scrofne's next concern, in two parts, addressed issues which the Commission find especially troubling. Mrs. Scrofne expressed concerns over the quality of water service and the amount which the Finley Valley customers will be billed from the City of Ozark. Mrs. Scrofne, and subsequently numerous other customers, testified that in the short time that the City has been operating the water system, albeit without authority to do so, the water meters of the customers have been read numerous times and these readings have consistently resulted in errors. Without exception, every customer who testified as to having had their meter incorrectly read testified that they were overbilled and not underbilled. The Commission finds that a significant number of the customers testified as to having been overbilled. Todd Staples also testified as to misread meters and quite possibly captured the consensus of the other

customers when he stated that the issue here was not whether this was dishonesty or a simple mistake, but rather, ". . . it's the attitude of the City on their part of refusing to try to cooperate with the citizens that are involved. . . ."

Mrs. Scrofne addressed the significance of a municipality which is not regulated by the Public Service Commission but which serves customers outside of its municipal boundaries. As nonresidents of the City of Ozark, the customers of this water system will not have elected representatives within the City to whom they may take their complaints and as an unregulated utility. These customers will no longer have the Public Service Commission or the Office of the Public Counsel to represent and protect their interests.

The second concern addressed in this area by Mrs. Scrofne was the fact that the City could presumably change the rates at any time and, again, the customers would have no recourse. As an example of the customers' lack of recourse, Mrs. Scrofne reminded the Commission that when she was in Jefferson City meeting with the Commissioners in Agenda, the City's attorney, Mr. Fischer, was at that meeting also. Mr. Fischer telephoned the City officials and returned to inform Mrs. Scrofne that the mayor and several other officials would be willing to meet with Mrs. Scrofne and other customers on Tuesday, October 17. Mrs. Scrofne informed the Commission at the local public hearing on Wednesday, October 18, that she had appeared for that meeting but the mayor had failed to appear.

(5) Mrs. Scrofne raised an additional issue which appeared to be an irregularity in that a Finley Valley customer identified as Mr. Witham was required to pay a deposit with Ozark as a new user. The uncontroverted testimony was that this occurred after Ozark had been directed to cease billing the increased rates and to cease conducting business as if it were now the owner of Finley Valley. The question then is, based upon the assumption that Ozark is acting only as an agent for Finley Valley, why is a Finley Valley customer being

required to pay yet another deposit? In the alternative, if Ozark is granted authority to assume ownership and control of Finley Valley, will preexisting customers be required to pay what would appear to be another deposit?

(6) Mrs. Scrofne has noted that there have been many statements on the record that this sale must be expedited because of the poor health of the owner and operator of Finley Valley Water Company, Mr. Leland Mitten. Mrs. Scrofne testified that the day she returned from meeting with the Commission in Jefferson City, upon arriving at her home she found Mr. Mitten had been supervising backhoe operations at the house next to hers.

(7) Lastly, Mrs. Scrofne testified that:

"My final statement is that we believe the City has proven not to have acted in good faith in their handling in this matter. How can we trust what service they will provide after they acquire ownership of the Finley Valley Water Company and the fact that we will have no one to complain to or anyone to see that we are treated fairly."

Approximately 28 individuals testified at the public hearing. Many of these individuals rose when it was their opportunity to speak and stated that they simply would join in with and support the comments which were made by Carole Scrofne. With the exception of the City employees and the attorney who represents the Applicant in this case, no one spoke in favor of the sale of Finley Valley to the City.

The Commission finds it significant when a public hearing is scheduled on such short notice, in this case on five days notice, and yet the hearing is so well attended. The Commission also finds it significant that the Finley Valley customers' position on the transaction was virtually unanimous. The Finley Valley customers did not oppose the transaction per se but were unanimous in their concerns about being captive customers with no recourse or representation. The Commission has received no complaints about the actual water quality or potability, and many of the Finley Valley customers readily accepted

the fact that the current owner might now be at an age which warranted his retirement, and consequently accepted the enhanced stability of operation which might come from the municipality. The customers who spoke at this hearing raised numerous examples of being overbilled by Ozark both in terms of being charged for more gallons than they had actually used and also for being charged more dollars per gallon than is currently lawful under the tariff. The testimony indicated that Ozark had conducted multiple meter readings in a period of approximately four to six weeks.

In conclusion, the Commission finds that the testimony at the public hearing identified seven issues which the Finley Valley customers believe need to be resolved. These issues are: (1) the involuntary change of street names and house numbers for Finley Valley customers, apparently in order to accommodate Ozark's billing system; (2) the failure of an appropriate notice to be issued as ordered by the Commission; (3) the refusal of Ozark officials to meet and negotiate the resolution of the various problems in good faith; (4) the quality and accuracy of the billing service; (5) the misrepresentation of the need for expediency based upon the current owner's alleged "failing health"; (6) the rate discrimination whereby Finley Valley customers who are nonresidents of Ozark will be charged one and one-half times the rates charged to Ozark customers along with the apparent attempt to require Finley Valley customers to again pay a deposit; and (7) the lack of representation which would allow the Finley Valley customers some voice or recourse regarding the terms, conditions and rates for their water service. In light of these issues the Commission finds that pursuant to Section 386.250, R.S.Mo. 1994, the Commission has jurisdiction over these issues with the exception of item no. (1) and, to some extent, item no. (3).

III. Application to Intervene

On October 26, 1995, the Commission received an Application To Intervene Or Participate Without Intervention which was filed in this case by attorney John E. Price on behalf of Carole Scrofne, et al. (Intervenor). On that same date Intervenor filed a Proposed Intervenor's Motion For Continuance on behalf of the same individual(s). In support of the Application To Intervene Or Participate Without Intervention, Intervenor states there is good cause for the Commission to allow this application to intervene despite the fact that it was not filed before the intervention deadline. In support of this argument, Intervenor states that despite the Commission's order to the contrary, Finley Valley Water Company submitted its original, defective notice to all customers of the service area. This notice was defective in several respects and Intervenor alleges inadequate notice of the deadline for intervention. Intervenor further states that it was not until October 25, 1995, that counsel was able to be retained for representation in this issue.

As further justification for intervention, the Intervenor states that Carole Scrofne and the other customers of Finley Valley Water Company have an interest in this proceeding which is different from that of the general public in that the current customers served by the City of Ozark are voting residents of that City who can redress any potential grievance concerning water service, rates or administration of their water system through the ballot box. The customers of Finley Valley who live outside the city limits of Ozark have no voice to address such issues. Intervenor notes that numerous problems were raised concerning the proposed sale of Finley Valley at the local public hearing and these problems have not been resolved. Therefore, Intervenor suggests, additional good cause exists for permitting this intervention so that the interests of the current customers of Finley Valley, those customers who are not residents of the City of Ozark, may be represented.

In support of the Motion For Continuance, the proposed Intervenor states that selected portions of the file in this matter have been received but the entire file was not yet available at the time of the request for intervention. Intervenor requests additional time in which to properly prepare pleadings in this case and to conduct discovery.

On October 31, 1995, Finley Valley Water Company and the City of Ozark jointly filed their response to the Application To Intervene Or Participate Without Intervention and the Motion For Continuance as filed by Intervenor. Finley Valley and Ozark oppose the intervention as being untimely filed. Finley Valley and Ozark assert that Intervenor's allegation that the notice issued herein was improper should be rejected. In support of this argument, Finley Valley and Ozark state that the Commission Staff has reviewed the adequacy of the notice and concluded that "the notice was sufficient to notify customers of the proposed sale and of their opportunity to comment." It must be noted that the Commission Staff is but a party to this proceeding and the opinion of a party to the proceeding is not substitutable for orders of the Commission. Finley Valley and Ozark also argue that because Carole Scrofne and Lisa Webb attended a Commission Agenda meeting on October 13, 1995, and stated their concerns regarding the proposed sale at that time, and because the Commission granted a request for a local hearing, any additional hearing in this matter would be unnecessary and cumulative.

Finley Valley and Ozark suggest that the Office of the Public Counsel is the statutory representative of the public in this proceeding and that, therefore, Intervenor's interest is already represented herein. This is incorrect. OPC represents the general public but not any individual of the public. Also, the Commission finds that OPC did not request a public hearing. OPC did submit a motion concerning the need for a public hearing in which it forwarded the petition to the Commission's attention. OPC stated to the ALJ to whom this case

was assigned, and also in an Agenda meeting with the Commissioners, that OPC would not oppose the transaction. It should be clear from the record that OPC does not and cannot represent the individual interests of Intervenor herein.

The Commission finds that Intervenor has demonstrated an interest in this proceeding which is different from that of the general public and Intervenor has an interest in this matter which is currently unrepresented. The Commission also finds that Intervenor has shown good cause for intervention out of time and the intervention will, therefore, be permitted. However, the Commission will not delay the disposition of this case to allow additional discovery by Intervenor. The Commission finds this case turns on a legal question. The development of facts beyond those which are already in the record would not be dispositive of the question raised in this case.

IV. Public Funding Corporation

The Commission has concerns regarding the structure of the transaction in this case. The application provides that Finley Valley will not be sold directly to Ozark, but rather, will be sold to a corporation. That corporation will subsequently lease the water company to the City and the City will pay monthly payments in return for the right to operate the water company and to collect payments for the water provided to the ratepayers. In an attempt to clarify this issue, the Staff filed its Brief In Support Of Staff's Recommendation on October 10, 1995, setting out the details of the proposed transaction.

One of the primary questions on this issue is whether or not a corporation which operates a utility would enjoy the same exemption from regulation which has previously been permitted for municipalities. The PFC is a creation of the City of Ozark and as such is legally indistinguishable from the City of Ozark.

Staff's brief responds to that question by stating that as an agent of the municipality, the PFC is exempt from the Commission's jurisdiction in the same manner as the municipality. The Commission finds that it need not reach the issue of a sale to a municipal corporation versus the sale directly to a municipality as that issue will not be dispositive of this case.

V. Extraterritorial Representation

In a recent application which was similar to the one sub judice, the Commission approved a transfer of a water system from a private owner to a municipality. See *In re Coney Island Water System*, Case No. WM-95-244. In that case the Commission stated:

The Commission finds that the sale and transfer of a water system to a municipality often provides greater management stability and financial resources than a water system operated by a sole proprietor or a small corporation. Municipalities may provide for some amount of subsidization from other streams of revenue which utilities cannot. And, by virtue of being operated by the municipality and its elected officials, the water system may essentially be operated by the very customers it serves. This may allow greater responsiveness than that which would otherwise be possible.

That same finding would be appropriate here but for the fact that the Finley Valley customers will, instead of moving to a system where they have greater voice in its operation, move to a system where the customers have no voice whatsoever. The Commission has often found circumstances where municipalities may be better able to provide the financial resources necessary to operate a water system and may also be better able to provide the manpower and technical expertise to do so as well. The final benefit which often makes municipally operated utilities attractive is the fact that the oversight of the utility is "closer to home." If problems exist with the utility, the customer need not travel to or communicate with the agent or agency which represents them in the state capital. Rather, the customer may contact their city councilman or

other local elected official. What is most important in either scenario is the fact that customers who are required to engage in business with a monopoly have some form of representation and/or protection. Representation is at the core of the United States and Missouri Constitutions and subjecting the citizens to a situation in which they have no voice nor avenue for recourse is indistinguishable from taxation without representation.

The Missouri General Assembly has provided a variety of means for monopoly utility services to be provided to residential and business customers in this State. In investor-owned, cooperative, and municipally operated utilities the common element found, in each method of service delivery, is the right of the ratepayers to participate in the ratemaking process. Investor-owned utilities regulated by the Public Service Commission must have their rates established by the Commission after a hearing in which all parties have an opportunity to be heard. Rates are to be just and reasonable and based upon evidence which is competent and substantial. The public is represented in all proceedings before the Commission by OPC, and Commission orders may be appealed by aggrieved parties through the state's judicial system.

Missouri statutes provide for rural electric cooperatives which, except for safety and territorial agreements, are not subject to the jurisdiction of the Public Service Commission. This is because the ratepayers, in essence, have the authority to run the cooperative. The customers themselves elect a board of directors which is responsible for operating the cooperative and setting rates. If the customers are dissatisfied, they may elect new directors or even run for the board themselves. Similar concepts apply in telephone cooperatives, public water supply and sewer districts, and homeowner associations.

Municipalities may establish their own utility systems subject to local regulation. In these situations, the city council or board of aldermen directly supervise the municipal utility or delegate that oversight to a utility

board. Rates are ultimately set by the city's elected representatives who must answer to the public for their decisions.

However, the principles of regulation break down when, as in this case, municipalities are allowed to provide utility services outside the city limits with no additional oversight. Residents living outside the city have no voice whatsoever in the regulatory process. They cannot complain (and expect to be heard) about rates or quality of service to a city councilman because they have no representation. They cannot take out their frustrations at the ballot box because they cannot vote in municipal elections. Their protection in the ratemaking process is nonexistent and the potential for discrimination and inequitable treatment is very real. In this particular case the evidence reflects that the City of Ozark plans to maintain a separate rate structure for those customers who live outside the city limits and those customers will be charged approximately 150 percent above the rate of City residents. These ratepayers have no avenue by which they may appeal this apparent discriminatory pricing nor may they appeal subsequent rate increases or changes in service which they believe are arbitrary, capricious, or abusive of process. The city council of Ozark will set the water rates and if Finley Valley customers object, their complaints may fall on deaf ears because they are not franchised. Moreover, the actions of the City of Ozark to date in this case certainly have not inspired confidence as to how the City will conduct itself in the future.

The Commission is now faced with the plain language of the statute.

The appropriate jurisdictional statute for this matter is set out below:

386.250 Jurisdiction of commission.—The jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under this chapter:

(3) to all water corporations . . . and the operation of same within this state, except that nothing contained in this section shall be construed as conferring jurisdiction upon the commission over the service or rates of

any municipally owned water plant or system in any city of this state except where such service or rates are for water to be furnished or used beyond the corporate limits of such municipality; (Emphasis added.)

The Commission finds no doubt that it is the intent of the Legislature that the Commission have jurisdiction over the services provided by a municipally operated utility, as to the unrepresented nonresident ratepayers, when that municipally operated utility extends service beyond its corporate limits. The Commission is well aware of several cases which have been tested in the courts as to this section and in which the courts have found the Commission lacked such jurisdiction. However, upon review the Commission finds each of those cases may be distinguished from the case sub judice. For example, Staff cited what is perhaps the most recent of these cases in its Brief In Support Of Staff's Recommendation (Brief). This case, *Forest City v. City of Oregon*, 569 S.W.2d 330 (Mo.App. 1978), held that the statute providing that the Public Service Commission has jurisdiction over water rates of municipally owned water plant where such rates are for water to be used beyond the corporate limits was ineffective under the circumstances in that case. However, that case involved sale of water from within one municipality to customers within a second municipality. In that case the citizens who lived in the city which purchased water continued to have representation by virtue of their own elected municipal representatives even though the water was purchased from yet another municipality.

The Commission has reviewed those cases which have addressed this portion of the statute. That review did not reveal any case in which the ratepayers have so clearly been excluded from the regulatory process and deprived of any representation whatsoever as exists with Finley Valley.

The Commission reads the provisions found at Section 386.250(3) with the knowledge that this section has existed in essence since the creation of the Commission in 1913. Some text has been changed, presumably to overcome problems highlighted by some of the cases in which the Commission decisions have been

appealed. But for the most part the concepts of the Commission's authority to regulate that portion of a municipally operated system which exists outside the corporate limits of that municipality have existed from the creation of this Commission and have been reenacted by the various amendments which occurred in 1939, 1963, 1967, 1980, 1987, 1988, 1991, and 1993. The various court decisions have not caused the Legislature to remove this jurisdiction from the Commission nor has the Legislature limited the Commission's jurisdiction as to this portion of a municipal utility. The Commission is ever mindful of its charge, which may be found at Section 386.040, R.S.Mo. 1994, which provides that the Commission

" . . . shall be vested with and possessed of the powers and duties in this chapter specified, and also all powers necessary or proper to enable it to carry out fully and effectually all purposes of this chapter."

In light of this mandate and in light of the plain language found at 386.250, the Commission finds no alternative but to order as a condition precedent to final approval of the transfer that the City of Ozark file for Commission approval, and continued authority, tariff sheets setting out its rates, terms and conditions of service for the provision of water service to the customers who reside outside of the city limits of the City of Ozark.

VI. Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact.

Finley Valley seeks permission and authority pursuant to Section 393.190, R.S.Mo. 1994, to sell and transfer all of the stock of Finley Valley Water Company to PFC and the subsequent lessor, Ozark. Finley Valley also seeks an order authorizing and permitting it to discontinue providing service in its service area as of the date of the sale and transfer.

The Commission finds that Finley Valley is a water corporation as defined by Section 386.020(51) and as such is subject to the jurisdiction of the Commission.

The Commission finds that the customers of Finley Valley have, virtually unanimously, expressed opposition to a sale or transfer which would result in those customers becoming captive customers with no recourse or representation in their water service.

The Commission finds that Finley Valley, PFC and Ozark have represented to the Commission that because of the health problems of the owner and operator of Finley Valley, this case required expeditious treatment. However, the Commission finds that the uncontroverted testimony at the public hearing indicated that the owner/operator of Finley Valley was able to be found at a Finley Valley construction area where he supervised backhoe operations. The Commission finds this representation is consistent with other assertions by the customers of Finley Valley that things are not what they appear.

The misinformation provided herein may be further illustrated by Exhibit No. 5 which sets out a chronology of inconsistent statements by the City as to the necessity of forcing a change of street names and house numbers upon the customers of Finley Valley.

The Commission finds that inaccurate notices have been issued to the customers of Finley Valley both by Ozark and by Finley Valley.

The Commission finds that the City of Ozark agreed to meet with the Finley Valley customers but Ozark failed to do so. The Commission finds Ozark has not demonstrated its interest in meeting and negotiating in good faith with the customers of Finley Valley.

The Commission finds the quality and accuracy of Ozark's billing procedures may be questioned, as may be the requirement that Finley Valley customers pay an additional deposit with Ozark.

The Commission finds the fact that Finley Valley customers who are nonresidents of Ozark will be charged one and one-half times the rates which are charged to Ozark residents appears to be an example of rate discrimination. There are occasions in utility regulation when rate discrimination may be appropriate but the record herein is insufficient to substantiate such a circumstance for the Finley Valley residents.

The Commission finds that the transaction as proposed in the application would result in approximately 180 families who would become captive customers of Ozark and who would have no representation, voice or recourse regarding the terms, conditions and rates established for their water service.

The Commission finds that the ready provision of a safe and adequate water supply is a fundamental need. The Commission is charged with ensuring the availability of safe and adequate water service to the citizens of the state of Missouri.

The Commission finds that the Finley Valley customers may find no authority to ensure their safe and adequate water supply absent the jurisdiction of the Commission. The Commission finds that the proposed transaction in this case would be detrimental to the public interest without the provision for representation of the Finley Valley customers.

VII. Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

Finley Valley Water Company is a public utility subject to the jurisdiction of the Commission pursuant to Chapters 386 and 393, R.S.Mo. 1994. The Commission has jurisdiction over the transfer of franchise or property herein pursuant to Section 393.190, R.S.Mo. 1994.

The Commission concludes that pursuant to Section 386.250, R.S.Mo. 1994, it has jurisdiction over water service which is provided by a municipality where such service or rates are for water to be furnished or used beyond the corporate limits of such municipality.

Based upon the findings herein and the conclusions of law as herein set forth, the Commission finds and concludes that it is in the public interest for the Commission to exercise its jurisdiction over the nonresident water customers of the City of Ozark.

VIII. Ordered Section

IT IS THEREFORE ORDERED:

1. That the application filed herein requesting authority for the shareholder(s) of Finley Valley Water Company to sell and transfer all of the stock of Finley Valley Water Company to the Public Funding Corporation of the City of Ozark, Missouri, is approved subject to the limitations or requirements set out hereinbelow.

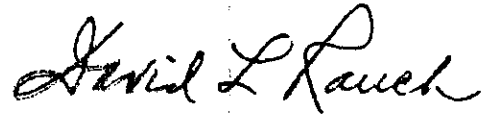
2. That good cause has been shown for intervention out of time and intervention is hereby granted to Carole Scrofne, et al.

3. That the Ozark Water System as operated by the Public Funding Corporation of the City of Ozark, Missouri, and by the City of Ozark, Missouri, shall file its tariff for Commission approval herein setting out the rates, terms and conditions of water service to be provided to those Finley Valley Water Company customers who live outside the corporate boundaries of the City of Ozark. Such tariff shall be filed with an effective date of January 5, 1996.

4. That upon Commission approval of the tariff set out in Ordered Paragraph 3 herein, the certificate of public convenience and necessity and the tariffs currently on file for Finley Valley Water Company shall be canceled by a subsequent Commission order.

5. That this order shall become effective on the 5th day of
January, 1996.

BY THE COMMISSION



David L. Rauch
Executive Secretary

(S E A L)

Mueller, Chm., McClure, Kincheloe
and Drainer, CC., concur and certify
compliance with the provisions
of Section 536.080, R.S.Mo. 1994.
Crompton, C., absent.